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The importance of fundamental structural language in the Law of Obligations

Martin A. Hogg

Polonius: What do you read, my lord?

Hamlet: Words, words, words.

Hamlet, Act II, scene ii.

Law is about words. There is no law without language. So we need to understand language if we are to understand the law. Specifically we need to have a shared understanding of the meaning of legal words if the law is to be applied consistently and fairly.

In the law of obligations, language is used in different ways and by different actors. In relation to voluntarily assumed obligations (though not imposed ones), the law takes the view that what the party or parties to be bound to the obligation mean when they use words matters. Those words give content to their obligations, so we try to aim to understand what the parties meant—or rather, could reasonably be taken to have meant—when they used the words they did. But there is another type of language which is relevant to the law of obligations. This is not the lexicon used by parties to give content to their voluntarily assumed obligations, but the lexicon used by legislators, writers, and courts when describing the nature of obligations generally, classes of obligations, and the consequences to which obligations give rise. This lexicon, of what might be called the “judicial bystander”, is thus a shared one, employed by third party observers, adjudicators, and teachers of the law. It is a lexicon which gives texture and structure to the law. I have chosen to describe this lexicon as that of the fundamental structural language of the law of obligations. In ascribing meaning to the words in this lexicon, we are not concerned so much, or rarely at all, with what the parties bound by obligations thought or might think about the meaning of these words, given the external perspective of the users of the lexicon. Freed from the need to try and assess what parties thought about the meaning of these words, legal systems are able to work towards an agreed, shared, objective meaning of the lexicon, one which enables everyone to understand the nature of obligations as juridical acts. That at least is a central thesis of my latest work on the subject, *Obligations Law and Language*, published by Cambridge University Press earlier this year.

In the limited time available to me today, I want to explore this thesis, and to test whether the law across English speaking jurisdictions has established a stable lexicon of the fundamental words deployed to describe obligations. As I hope I show in the book, the picture is mixed: there is a degree of stability in relation to a few terms, but often usage is confused. There is ample evidence of change of usage over time; of multiple, conflicting meanings being deployed (both within and between jurisdictions); of those using various words failing to explain what they mean in so doing; and (in certain instances) of unhelpful and confusing usages. My hope in writing and speaking about this subject is that lawyers from different legal systems can share and reflect upon the lexicon, and that suggestions can be offered on greater consistency in usage, the promotion of helpful usage, as well as the abandonment of unhelpful usage.

In my book I explore the meaning of a number of fundamental structural words: “obligation” itself, and the term often (but not invariably) used to denote that which flows from obligation, “liability”; “debt”; “conditional” and “contingent”; “unilateral” and “bilateral”; “gratuitous” and “onerous”; “mutual”, “reciprocal”, and the more exotic “synallagmatic”; and “voluntary” and “consensual”. There are other words in the lexicon which I could have, but

have not yet, explored in any detail in my published research, for instance “damage” and “injury”; “subsidiary” (a slippery term currently being given a thorough examination by my able doctoral student Mat Campbell); “primary” and “secondary” (in one usage, at the heart of the recent Supreme Court case of *Makdessi v Cavendish*); and “principal” and “accessory”; among others—I expect that you might have some suggestions as to others which could be added to the list. It is remarkable how little systematic attempt has been made to explore this lexicon. All we have are scattered observations in numerous cases, and occasional hints in legislative acts. Yet such words are crucial in framing the law and our understanding of it.

As I must limit my exploration today, perhaps it’s best to take a couple of examples of terms and explore their established usages, before offering a suggestion as to whether such usages are helpful.

Liability

Let me start with the term ‘liability’. On page 1 of your handout, there is a list of common usages which I have encountered in my researches. We can add to these commonly found senses, Hohfeld’s understanding, again given on [age 1 of your handout. It is curious that, given the variety of usage of the term liability, Hohfeld chose not to subject it (or indeed the word ‘obligation’) to the same close analysis as he did the term ‘right’, whose varying meanings were the principal focus of the exercise he was undertaking in compiling that table.

One of the perennial problems in pinning down varying meanings ascribed to liability is its relationship with the word obligation. The problem originates in the common Latin origin of both terms: each term derives from the Latin verb *ligare*, to bind. Unsurprisingly, therefore, one meaning commonly ascribed to ‘liability’ is simply the state of being bound, that is of being under an obligation (whether an obligation in the narrower, Roman law sense, or the wider sense of any legal duty). But given that we could simply describe a debtor under an obligation as ‘being bound’ (*obligatur*), there is no strict necessity for a separate word liability to do this task. Yet we have it. And having it, we have a word which has come, in some usages, to mean something other than simply being obliged or bound.

Is there a core, primary usage, from which other usages have branched off? It would be challenging to assert as much. Primary candidates might be *sense one* (a synonym for duty), *sense three* (a duty of performance flowing from an obligation), or the more general notion of legal accountability (*sense six*). But courts have remarked on the breadth of potential meaning, as the comment of Justice Raper on your handout attests at roman numeral (iii) on page 2: [read out (iii)]. Then again, as is noted in the next following quotation, Justice Windeyer thought there were three “main senses”: [Read out (iv)]. The difference between the first and second of Justice Windeyer’s meanings has sometimes been described as the difference between “primary” and “secondary” liability: so, Justice Woolf in *Walters v Babergh*, who was dealing with the need to interpret the word “liabilities” within the context of a legislative provision transferring liabilities between a local authority and its successor, described that distinction at Roman numeral (v) on your handout: [Read out (v)].

When the term appears in legislation, it is almost never defined, which I repeatedly point out in my book has been a source of continuing confusion, difficulty, and litigation. One may speculate as to whether this is because of a recognition by legislative drafters of the multitude of senses it may bear (a likely explanation, if a cop out), or because of a belief that there is a shared understanding of what it means (perhaps, but less likely).

Some judges have taken the view that, at core, while ‘debt’ signifies monetary obligations, by contrast the term ‘liabilities’ signifies obligations to do anything *other* than pay money. The wording of some statutes has been interpreted in a way supportive of such a distinction: as for instance in the case of the Debtors Act 1869, which I quote on your handout

at Roman numeral (vi) on page 2 of your handout.¹ But others have taken the opposite view, one Australian judge suggesting that ‘the primary meaning of “liability” does relate to an obligation to make a payment, or to being subject to some pecuniary obligation’.² This differing approach is reflected in some legislative provisions.³ A well-timed, but again somewhat differing view from a judgment earlier this month is on your handout at Roman numeral (vii), where, as you can see, Lady Wolffe also thought it helpful to begin by looking at the “primary meaning” of the word liable. (I take her remarks to be in favour of a primary meaning suggestive of exposure to accountability flowing from breach of an obligation.) In my view, it is rather worrying that courts seem to have held quite variable views on what the primary or core meaning of liability is! One can take the view that context is everything, but that is of little help to anyone faced with trying to predict the meaning of the word when used in a specific legislative context when the legislative act itself gives no definition.

Why does it matter what liability means? Well, it matters for one of a number of reasons. Clarity of pedagogy is of course one. But some of the reasons are also very practical ones. Sometimes courts are faced with a usage of the term which is intended as a means to identify a specific party to be held accountable in law (for instance, one accountable to pay damages in tort/delict): so Australian Chief Justice Barwick remarked in a case on workmen’s compensation legislation (he is quoted at the top of page 3 on your handout) that “‘Liable’ is used ... in my opinion, as meaning legally responsible, that is to say, it describes the person who by his act or omission caused the compensable injury and thus was legally responsible for it and for the payment of damages appropriate to it’.”⁴ There have been a number of cases, including some recent Scottish cases, where a successor local authority has had transferred to it the “liabilities and obligations” of its predecessor. The question has arisen in such cases of whether a wrongful act occurring before the date of transfer but not manifesting any damage until *after* that date was intended to be included in the transfer of ‘liabilities’. Could the state of affairs after the occurrence of the wrongful act but *before* the manifestation of harm be considered to give rise to “contingent liabilities”, and if so could were these covered by the word liabilities? The English High Court in *Walters v Babergh District Council* thought so; as subsequently did the Australian High Court in *Crimmins v Stevedoring Industry Finance Committee*, which considered that one could legitimately speak of a ‘contingent liability’ in tort when there had been a breach of duty but as yet no manifested injury; in the Scottish courts, the outer House in *Anton v North & South Ayrshire Councils* took the same approach, but in *Bavaird v Sir Robert McAlpine Ltd*, another Outer House case, the judge held that “[a]s a matter of ordinary English usage liability means being bound or obliged to do something in accordance with a rule” and that for liability to exist there had to be both harm (*damnum*) and a legally relevant injury (*injuria*). The majority of these courts took a purposive approach, to

¹ The Debtors Act 1869, s. 13(1), began ‘If in incurring any debt or liability he has obtained credit under false pretences ...’, the question for the court in *R v Ingram* [1956] 2 QB 424 being what, if any, difference in meaning was to be ascribed to the two terms. Goddard LJ’s judgment proceeds from the conception that ‘debt’ involves the incurring of a monetary obligation, whereas ‘liability’ the incurring of an obligation to do something other than pay money.

² Hodgson J in *Attrill v Richmond River Shire Council* (1995) 38 NSWLR 545. This view was shared by the Supreme Court of Michigan in *Grand Trunk Western Railway Co v Boyd* 321 Mich. 693, 33 N.W. 2d 120 (1948), who said that the common meaning of liability as an obligation to pay a debt or amount owed was ‘its plain and almost universal meaning’ (an assumed basic understanding criticised in the later judgment of Clark J in *Krenger v Pennsylvania Railroad Co* 174 F.2d 556 (1949)).

³ See *Foots v Southern Cross Mines Management Pty Ltd* 2007 HCA 56, discussing s82(8) of the Australian Bankruptcy Act (‘liability includes: ... (b) an obligation or possible obligation to pay money or money’s worth’); also *In Re Nortel*, in which rule 13.12(4) of the insolvency rules in question similarly defined ‘liability’ to mean ‘a liability to pay money or money’s worth’.

⁴ Barwick CJ in *Tickle v Hann*, interpreting the phrase ‘person liable to pay the damages’ in s 22(1)(d) of the Workmen’s Compensation Ordinance 1949-1968 (NT).

ensure support the underlying purpose of such transfers—which is to ensure a seamless takeover of the responsibilities of the predecessor by the successor—and to prevent injured persons from being disadvantaged merely on account of such transfers. I think that was right (and that the court in *Bavaird* got it wrong), but the problem could have been avoided had not the various legislative drafters fudged matters by throwing in undefined omnibus phrases like “rights, obligations and liabilities” in the optimistic hope that in so doing they would catch all conceivably legally relevant conduct.

One solution to the problems caused by the expansive word ‘liability’ would be for legislators and courts to avoid using it altogether. The drafters of the DCFR chose to retain its usage, though its deployment in provisions is variable: so, for instance, while liability appears in the title of Book VI, ‘Non-contractual liability arising out of damage caused to another’, apart from this reference in the title, the provisions of Book VI use the term ‘accountability’. The Principles of European Tort Law *do* use the term, as does the Restatement (Third) of Torts. It is also used (though rather patchily) in the Uniform Commercial Code, and in the Restatement (Third) of Restitution and Unjust Enrichment. In these instruments, liability tends to be used in relation to the consequences of breaches of duty or the consequences of wrongful conduct (so that there is an avoidance of terms like ‘duty to pay damages’ in favour of ‘liability’ to do so), but the term is not always used consistently and uniformly within instruments. Like more targeted national statutes, these general instruments do not define the term.

My overall view of liability is that, while it seems to remain in favour as a term deployed by commentators and teachers of the law, by courts, and in legislative provisions, the core meaning which it is thought to bear varies, and failure to communicate its meaning (especially in legislation) has been problematic.

Mutual

For my second case study of fundamental structure language, I want to consider briefly the word ‘mutual’.

The English word’s derivation is the Middle French *mutuel*, this in turn deriving from the classical Latin *mūtūus*, meaning ‘borrowed, corresponding, or reciprocal’. In post-classical Latin (probably around the tenth century), the adjective *mutualis* (mutual) developed. The Oxford English Dictionary gives the principal sense of the English word ‘mutual’ as being (as your handout notes):

[o]f a feeling, action, undertaking, condition, etc.: possessed, experienced, or performed by each of two or more persons, animals, or things towards or with regard to the other; [*then it adds:*] reciprocal.

So, the primary definition encompasses two quite different ideas: *either* something done by each of two (or more) persons *or* reciprocal (as in corresponding to, or relating to, each other). As we’ll see, this ambiguity of meaning has crept into legal usage of the term.

My researches have disclosed that there are three main senses in which legal texts have used the term mutual (these are reproduced on Roman numeral (ii) on page 3 of your handout):

Sense one: To mean ‘on both sides’

Used in this sense, the word ‘mutual’ commonly appears in one of two contexts. The first context signifies a relationship which is *burdened* on both sides; the second, one that is *formed* by consent on both sides. Consider these examples of the two contextual usages: First, there is the phrase ‘mutual contract’, to signify (usually) a contract where the parties are *burdened or obliged on both sides*, so that each party owes duties to the other, their ‘mutual obligations’.

Second, there is the phrase ‘mutual assent’, to signify that each of two parties is involved in forming a contract, by having consented to be bound contractually to the other. In other words, the phrase signifies agreement or *consensus in idem*. In this second variation, it’s not necessary that each side be burdened by any duties—the ‘unilateral contract’ of the Common law demonstrates mutual assent, though only one party is burdened by any duties.

Sense two: ‘burdened equally, or in the same way’

Sense two signifies that each party is burdened with *the same duty or to the same extent*. This sense is disclosed in usages such as parties being under a ‘mutual duty’ to perform a specific undertaking, such usages indicating that each party has the same duty resting upon it as the other party has. (This sense can be argued to incorporate, albeit go further than, sense one)

Sense three: ‘inter-related and corresponding’, in the sense of being inter-dependent

This sense is disclosed in usages such as the ‘mutual causes’ of a contract or of the obligations under a contract, or ‘mutually dependent’ obligations. This sense of ‘mutual’ equates with reciprocal, either in its general sense or in one of its more specific senses (which I don’t have time to discuss—see the book for details!).

I should add that, while I believe that these three senses of ‘mutual’ are distinct from each other, it can also be argued that all three senses are linked either in that ‘inter-relatedness’ (the third sense) is at the core of them all, or in that ‘inter-related conditionality’ is their core (as I think the Scottish author Gloag can be taken as suggesting⁵).

In Scots law, mutual has been used to denote a general quality applicable to obligations, as in ‘mutual contract’ or ‘mutual obligations’. Roman law didn’t do this, even though it recognised a type of contract called *mutuum* (a loan for consumption). Overall, what is noticeable in the Scottish literature is, in addition to the application of the language of mutuality/reciprocity to specific terms and obligations, a much greater usage of the term ‘mutual contract’ than one sees in English sources. The entirety of a contractual relationship is seen as being capable of description in mutuality terms, albeit that sometimes this refers to bilateral form, sometimes to contracts imposing duties on both sides, and sometimes to contracts with reciprocal (i.e. corresponding) obligations—so, there is a variety of meaning in describing contracts as mutual. While the classification of a contract as mutual is not as crucial in the Scottish jurisprudence as the classification of voluntary and involuntary obligations, or unilateral and bilateral obligations, it nonetheless operates as a classification with not simply structural but also remedial significance, given that some sorts of remedy (like retention of contract) are applicable only in circumstances of mutual obligation.

In English law, if we look at the close of the eighteenth century, the language of mutual contract or obligation (or reciprocal contract/obligation) appears to have been largely absent from English legal writing, with the exception of Bracton’s earlier usage of ‘mutual’, of a few descriptions of marriage in those terms, and of Geoffrey Gilbert’s brief usage in his *Treatise of Equity*; however, the phrase ‘mutual recompence’ (recompence meaning ‘consideration’) is encountered in a number of texts. The translation of Pothier’s *Obligations* into English in an 1806 translation brought the language of mutuality to the attention of English readers, though in Pothier it is the language of reciprocity which is more often used when mutuality in the third sense I identified is intended. Pothier’s English disciple, Colebrooke, took up the linguistic baton in his *Obligations* treatise of 1818, telling the reader (see (iii) on page 3 of your h/o) that

⁵ Gloag, *Contract*, p 58.

Obligations are mutual and reciprocal, or non-reciprocal. Reciprocal or mutual obligations are those which answer to each other: so that each of the parties is bound towards the other to perform some thing.

This is a slightly difficult passage, as it seems to roll into one the ideas of bilaterality (binding on two parties) and reciprocity.

Some later authors are more precise. For instance, in Herbert Broom's *Commentaries on the Common Law* (1856), the author explains that mutual may have two different meanings which relate to reciprocity of assent and reciprocity of obligation. But other influential authors make no usual of the idea of mutuality at all: so, for instance, in Pollock's *Principles of Contract Law* (1876), apart from some scattered references to 'mutual assent' or 'mutual error' (usages suggestive of *sense one*) the concept of mutuality is largely missing. Overall, the picture in the English literature is confused: sometimes 'mutual' and 'reciprocal' are used as synonyms, sometimes not; sometimes 'mutual' signifies merely 'on each side' (as in 'mutual assent'), but sometimes it signifies 'reciprocity', being suggestive of (in general terms) 'inter-connected', or, more specifically, 'conditional upon' or 'offered in exchange for'; sometimes it seems to be used as an alternative term to 'bilateral'. What does emerge by way of largely consistent usage in the literature is a sense that 'mutuality of assent' may be distinguished from 'mutuality of obligation', and the idea that consideration can be described using the language of reciprocity.

As for case law, usage in English cases of the language of mutuality is sparse: it appears in 1957 in *Re Austin Motor Co Ltd's Agreements*. More recently, in the 2003 House of Lords decision in *Homburg Houtimport BV v. Agrosin Private Ltd and others (The Starsin)*, Lord Hobhouse spoke (in Roman (iv) of your h/o) of a contract which "although mutual, does not involve an exchange of promises but, rather, an exchange of the performance of a service for protection in relation to that performance". The usage is slightly hard to decipher, but it doesn't seem to mean reciprocity of obligation; I argue in the book that I think *sense one* is intended. By contrast, in the earlier 1997 case of *Hurst v. Bryk*, the same Lord Justice Hobhouse (as he then was) had explained (at (v) on your h/o) that the "partnership agreement is a mutual contract containing mutual obligations by the partners towards each other. All the obligations and rights are interdependent", a usage suggestive of a usage in *sense three* (reciprocal). One should add to these contract references the remark that the phrase 'mutual obligation' has also made an appearance in tort cases. In the Privy Council Appeal in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd*, Lord Scarman, in discussing concurrent liability in contract and tort, stated: "Their Lordships do not, however, accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract." This is a significant statement, as it suggests that the idea of mutual obligations is not restricted simply to contract, but may be applied in the law of tort too. In this context, 'mutual' seems to mean 'on each side' (i.e. *sense one*), and it may also perhaps signify the same duty being owed on each side (*sense two*). But it seems not to mean 'reciprocal' (*sense three*), as a duty of care is not a dependent duty, the performance of which is conditional upon others exercising their own duties of care.

I'm afraid, as the book shows, there is no greater consistency in usage of the term mutual in the Scottish decisions either. What we do see however is early development of the language as a means of regulating remedial entitlement: so, in a petition to the Court of Session in 1761, the petitioner argued that 'no Party can demand Implement in a mutual Contract, until he has performed his part'.

There is little usage of the language of 'mutuality' or 'reciprocity' in legislation, though one fascinating early example is found in the public law sphere, in some 'articles' (i.e. draft legislation) from 1567 approved by the Scottish Parliament requiring new monarchs to make a

public profession of the Christian faith before being crowned. The relevant article ends by making reference to the fact that this duty on the monarch derives from a mutual contract between monarch and people, the text narrating that ‘the bond and contract to be mutual and reciprocal in all times coming between the prince and God and his faithful people’. A number of modern statutes use the term ‘mutual debt’, as well as ‘mutual credit’ and ‘mutual dealing’, though the term is not defined.

In terms of model law, the sole use of the word ‘mutual’ in the articles of the DCFR is in Article IX.-5:101(1), which states that ‘[t]he security provider and the secured creditor are free to determine their mutual relationship with respect to the encumbered asset, except as otherwise provided in these rules’. However, the Principles which precede the text of the Articles do mention the idea of mutuality: Principle 41 notes that

if both parties have obligations under a contract what goes for one party also goes for the other. This idea – sometimes called the principle of mutuality in contractual relations – appears, for example, in the rule on the order of performance of reciprocal obligations: in the absence of any provision or indication to the contrary one party need not perform before the other.

It is interesting that this statement locates the core of the idea of mutuality as equality and timing of remedial entitlement. These are important aspects of the idea of mutuality, though I don’t think they exhaust its nature. Despite its significance, the drafters chose not to translate this idea of mutuality into provisions using the language of mutuality.

Whilst the Uniform Commercial Code does not use the term mutual, the Restatement (Second) of Contract uses ‘mutual assent’ to mean agreement on both sides (one of variants of *sense one* described earlier), a sense which is distinguished from mutuality of obligation, addressed in §79, which is used to signify a contract under which both (or all) parties come under an obligation, and is thus the other variation of *sense one*.

What can we make of all this? The language of mutuality is imprecise. In all of the jurisdictions I studied in my book, the term ‘mutual’, as it has been employed in descriptions such as ‘mutual contract’ and ‘mutual obligation’, has been the subject of variable meaning, the meaning intended in a specific instance not usually being the subject of adequate explanation. The result has been that such descriptions have been vague and sometimes confusing, with little beyond an imprecise sense of ‘on each side’ being conveyed through the use of the term ‘mutual’. Often, we encounter an elision of meaning into other fundamental structural terms, specifically bilateral (two-sided) and reciprocal (interdependent), which raises the question of which terms we ought to be using when constructing our fundamental structural lexicon.

Conclusions

My specific conclusions in the book regarding liability and mutuality were essentially the following: (1) that, in the case of liability, there is evidence of a judicial view that there is a basic or core idea encapsulated by the term. Unfortunately, what this core meaning might be is a matter of dispute. However, one common view (emerging in the draft instruments examined) is that it means exposure to accountability for some conduct, usually a breach of duty or some other (in broad terms) wrongful conduct, but sometimes just the performance of a duty (as in liability to pay a debt). If the term itself is to be used in a legal context, what is meant could conceivably be spelled out in a way that avoids problems of lack of clarity. Alternatively, different terminology might be employed, though one would need to have confidence that any alternative term was precise in the meaning it conveyed; (2) as for the word mutual, that while usage of the language of mutuality is deeply ingrained in some systems, caution should be

shown in using it. Alternative terminology can be used, and should be (where possible). At most, mutual can only safely be used if what is meant is, in general terms, ‘on each side’, but even then such usage is likely to beg the question ‘in what way?’.

My more general conclusions on the use of fundamental structural language included the following four points, with which I’ll finish:

1. Any attempt to create taxonomies of obligations necessitates the use of fundamental structural language. The viability of such taxonomies depends upon a shared understanding of the meaning of the structural language employed.
2. While context is an essential part of interpreting all language, it is legitimate to begin an interpretation of the usage of fundamental structural words with core meaning(s), so it is important to agree on the core meanings of words. This approach of beginning from core meanings is legitimated by the purposes for which such words are used, and the largely external perspective of the legal actors employing the lexicon.
3. Unfortunately, fundamental structural words have not always been used with precision or with sufficient explanation of the meaning intended in specific contextual usages. There is a deep and varied historical content to the lexicon.
4. Some usages of structural language which have developed over time are unhelpful and should be discontinued. I note these in the conclusion of my book and make some recommendations as to potential desirable changes in terminological usage. Whether any of these suggestions are adopted, remains to be seen, however!